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April 17, 1997

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Federal Communications Commission
Office of Secretary

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W.; Room 222
Washington, D.C. 20554

Re: Notification of *Ex Parte* Contact in ET Docket No. 93-62

Dear Mr. Caton:

The Personal Communications Industry Association ("PCIA"), by its attorneys, hereby notifies the Commission of an *ex parte* contact in ET Docket No. 93-62. On April 17, 1997, Mark Golden, Craig Krueger, and Sheldon Moss from PCIA and Eric DeSilva from Wiley, Rein & Fielding met with Suzanne Toller to discuss matters raised in the attached leave behind and in the attached letter previously filed with the Commission.

Should any questions arise concerning this notification, please contact the undersigned at (202) 828-3182.

Respectfully yours,

Eric W. DeSilva

Enclosures: (2)
cc: Suzanne Toller

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PCIA *Personal Communications Industry Association*

**POLICY GUIDELINES AND EXPEDITED PROCEDURES ARE PROMPTLY NEEDED TO CURTAIL EXCESSIVELY ONEROUS STATE AND LOCAL ELECTROMAGNETIC ENERGY EMISSIONS REGULATION**

- Although direct attempts by state and local governments to regulate tower siting on the basis of electromagetic energy emissions ("EME") have been limited to date, there is a real risk that, unless a decisive process is adopted, there will be an exponential growth in attempted regulation – direct or indirect – of antenna sites based on EME factors.

- State and local zoning rules and zoning board decisions have violated Section 332(c)(7)(B)(iv) by regulating "the placement, construction, and modification of personal wireless service facilities on the basis of the *environmental effects of radio frequency emissions* [even though] *such facilities comply with the Commission's regulations* concerning such emissions."

- Policy guidelines are needed that clearly set forth under what circumstances state and local testing and documentation requirements related to EME are permissible before such requirements become so onerous and pervasive so as to effectively constitute state regulation.

    - The Commission should develop clear guidelines governing the nature of testing and documentation regulations that amounts to impermissible state regulation of tower sites based on EME factors.

    - Unless a party challenging a tower siting application can *adduce affirmative evidence of non-compliance with Commission EME standards*, state and local zoning authorities should be prohibited from taking evidence on this issue.

    - PCIA also proposes the following, expedited timeline for resolving challenges to state and local actions that violate Section 332(c)(7)(B)(iv):

        (1) an aggrieved party would file a petition for a declaratory ruling that has attached to it a certified copy of the state or local rule, statute, or adjudicatory decision in question;

        (2) the aggrieved party would serve the state or locality and the state or locality, and interested members of the public, would have 30 days to respond;

        (3) after all comments are received, the Commission would be required to rule on the petition within 30 days.

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- PCIA's newly proposed procedures are consistent with the Administrative Procedure Act, applicable judicial precedent, and will further the public interest by ensuring the prompt roll-out and continued expansion of public wireless mobile communications systems.

- PCIA is here today primarily to urge the Commission to act promptly on the Wireless Telecommunications Bureau's EME item to expedite needed relief for wireless carriers across the country.

    - It is essential to get the NPRM released soon, so that comments may be obtained and properly considered, and policies and procedures quickly adopted.

    - Delay in Commission action will spur problematic state and local regulation.

PCIA Personal Communications Industry Association

DUPLICATE

March 19, 1997



Michele C. Farquhar, Chief
Rosalind Allen, Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Dear Michele and Roz:

The purpose of my writing you is to suggest a mechanism for speedy and equitable resolution of situations where a wireless carrier believes that a state or locality is unduly exerting its authority in areas regulated by the Commission or otherwise governed by federal policy. PCIA had planned to submit this recommendation as a petition for declaratory ruling. However, because we are aware the Commission is nearing completion on an extensive and multifaceted effort to address siting and other issues in a new notice of proposed rulemaking, we have decided to convey our recommendation in a less formal manner. I hope the Commission will be able to consider and perhaps seek public comment on the recommendations I make in this letter.

As you are well aware, PCIA members that are constructing their wireless networks have been substantially frustrated and oftentimes delayed or thwarted by a wide range of municipal, county, and state regulations, policies, and decisions reached by local zoning and planning boards. The Wireless Telecommunications Bureau and the Commission have been effective in working with local governments and the wireless industry to clarify a wide range of legal and procedural questions and conflicts that have arisen in the context of constructing wireless telecommunications networks. PCIA also recognizes that in an upcoming notice of proposed rulemaking, the Commission will seek further resolution of the difficult issues that have arisen in the antenna siting process.

The suggestions I am making in this letter address one subset in the range of problems and roadblocks encountered by wireless carriers -- when local agencies attempt to regulate tower siting on the basis of the environmental effects of radio frequency (RF) emissions. While the number of instances where states and localities have overextended their reach in this area has been limited (and the Commission has done a commendable job in deterring localities in this regard), PCIA is concerned that,

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unless a decisive process is adopted, there will be many more instances where states and localities attempt to exert control over the siting of wireless facilities through directly or indirectly regulating the environmental effects of RF emissions.

While PCIA recognizes that localities have substantial authority over land use issues, certain aspects of such regulation have been federalized by statute, specifically including the regulation of tower siting based on the environmental effects of radio frequency emissions. Accordingly, PCIA believes that the Commission should (and legally could by means of a declaratory ruling): (1) clearly define what testing and reporting procedures states and localities may adopt in order to ensure compliance with federal RF regulations; (2) prohibit adducing evidence regarding the health effects of RF emissions at zoning board hearings absent an affirmative showing that the zoning applicant has failed to comply with federal standards; and (3) promulgate streamlined procedures for processing petitions that request preemption of state and local rules that attempt to regulate RF emissions in a manner inconsistent with federal standards. PCIA is of the view that Commission action in this regard will allow wireless carriers to build out their networks, and to offer to the American public the wide variety of wireless services envisioned by Congress.

Our members have advised us of occasions where state and local zoning rules and zoning board actions violate Section 332(c)(7)(B)(iv) of the Communications Act of 1934, as amended, by regulating "the placement, construction, and modification of personal wireless service facilities on the basis of the *environmental effects of radio frequency emissions* [even though] *such facilities comply with the Commission's regulations* concerning such emissions."[1] The state and local actions in question rarely go so far as to set standards for radio frequency emissions in excess of federal criteria. Rather, they establish RF testing and documentation regimes that far exceed what the FCC requires under Rule 1.1307(b),[2] or use other criteria as subterfuges for denying zoning applications on RF grounds. As such, these regulations constitute prohibited

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[1] 47 U.S.C. § 332(c)(7)(B)(iv) (emphasis added).

[2] This section provides that "[a]pplications to the Commission for construction permits, licenses to transmit or renewals thereof, equipment authorizations or modifications in existing facilities *must contain a statement confirming compliance with the [FCC] limits . . . Technical information showing the basis for this statement must be submitted upon request.*" 47 C.F.R. § 1.1307(b) (emphasis added).

"indirect" regulation of tower siting based on the environmental effects of RF emissions.[3]

PCIA's members report that various localities have taken the following actions, all of which represent prohibited efforts to indirectly regulate -- in excess of FCC standards -- the environmental effects of RF emissions:

- Laguna Beach, California, Municipal Code Section 25.55.008: "Within (3) months after construction of a telecommunications facility which contains transmitting antenna(s) . . . the maximum Radio Frequency (RF) radiation shall be measured and documented in a written report submitted to the City. The measurement and report shall be performed and prepared by a qualified, independent testing/service consultant retained by the City at the applicant's expense. The measurement shall be made utilizing the most current testing protocol established by the Federal Communications Commission (FCC)."

- Greenburgh, New York, Local Law 7, Section 14(16): All applications to an approving agency shall be accompanied by a report, signed by a New York state licensed professional electric engineer, and, if a tower is required, a licensed structural engineer, requiring among other information, the following: (1) transmission and maximum effective radiated power of the antennae; (2) direction of maximum lobes and associated radiation of the antennae; (3) certification that the non-ionizing emitted radiation levels at the proposed site are within threshold levels adopted by the FCC and that the proposed site will not produce or contribute to the production of emission levels exceeding the [FCC] thresholds . . . based on the maximum equipment output.

- San Francisco, California, WTS Facilities Siting Guidelines, Section 11 (Aug. 15, 1996): "The Project Sponsor shall submit to the Zoning Administrator 10 days after installation of the facilities, and every two years thereafter, a certification attested to by a licensed engineer expert

[3] *See* S. Rep. No. 104-230, 104th Cong., 2d Sess. at 208 (1996) (stating that the intent of Section 332(c)(7)(B)(iv) is to preempt state and local regulation of wireless facility siting based "directly or indirectly" on the environmental effects of RF emissions).

in the field of EMR/RF emissions, that the facilities are and have been operated within the then current applicable FCC standards for RF/EMF emissions."

- Clarkstown, New York, Clarkstown Town Code, chapter 251-18: Ordinance requires submission of calculations taken by a New York state licensed professional engineer, health physcicist, or RF engineer for *all* proposed wireless facilities. It also requires the annual submission of RF field strength measurements from *all* wireless facilities and that a certified expert attest that each facility complies with the federal law.

- The San Francisco Planning Commission denied an application from a broadband PCS provider to replace the cross above a church with a camouflaged antenna designed to look like the original cross. The commission's decision came on the heels of organized protests by activists who claimed that the radio frequency emissions from the proposed transmitter could be harmful to children that attend the church school.

- A San Juan County, Washington, zoning board listened to a great deal of citizen testimony that focused on the health effects of RF emissions, and then denied the tower siting application at issue. While the zoning board's written decision was not based on the environmental effects of RF emissions, it *was* based on the opposition expressed by residents and property owners -- which focused on these environmental effects.

- Vancouver, Washington, Draft Ordinance Section xx.xx.120: "Within six (6) months after issuance of its occupancy permit, the applicant shall submit a project implementation report which provides cumulative field measurement of radio frequency (EMF) power densities of all antennas installed at a subject site. This report shall quantify the EMF emissions and compare the result with currently accepted FCC standards."

- The state of Vermont has issued a bulletin (Technical Bulletin #38) that may become the basis for a new state government policy that will oblige all wireless communications service providers and operators that wish to base transmitters on state-owned property to "voluntarily" limit RF emission output to levels substantially below the new exposure limits established by the FCC. The implication of such a policy is that the

state of Vermont will *only* issue leases to wireless carriers that agree to limit their output to the lower levels. While state officials have claimed that such "contractual" arrangements between a state agency and a service provider do not constitute regulation, potentially discriminatory action against providers that do not "voluntarily" opt to reduce their output *does* constitute state regulation of environmental effects.

- The Palm Beach, Florida school board, bowing to pressure from a small but strident activist group, issued a 90-day suspension to its existing policy of leasing property for sitting wireless communications facilities on school properties so that it could study how other jurisdictions have dealt with such requests. This moratorium was enacted immediately after organized and widely publicized efforts by a group called "Families Against Cellular Tower at Schools" charging that radio emissions from cellular towers being erected on school grounds may endanger school children. It appears likely that the school board will use environmental and health concerns to rescind agreements previously reached with wireless carriers to allow monopoles to be constructed on school grounds.

These types of state and local practices will cause carriers to expend a considerable amount of resources in carrying out the mandated testing and reporting requirements. They make it very difficult for new wireless carriers to enter the telecommunications market and impede the ability of existing wireless carriers to upgrade their infrastructure. Significantly, because new market entrants cannot begin to offer service to the public until they have built out their networks, these state and local rules are particularly disadvantageous to newly licensed carriers. By serving as barriers to market entry, such rules stifle competition in the wireless marketplace, contrary to Congressional intent as set forth in Sections 253(a)[4] and 332(c)(3).[5]

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[4] "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate of intrastate telecommunications service." 47 U.S.C. § 253(a).

[5] "[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service." 47 U.S.C. § 332(c)(3)(A).

Moreover, if localities perceive that they are somehow empowered to undertake extensive regulation of wireless tower siting based on RF factors, it is reasonable to expect that they will broadly use such authority. Siting decisions based on emotional or other questionable bases will thwart the complete build out of competitive wireless telecommunications systems. Indeed, concerns about such zoning regulation helped to prompt adoption of Section 332(c)(7)(B)(iv).

Many carriers are reluctant to advise states and localities that their regulatory actions are in violation of federal law, for fear of retribution. Further, when carriers do come forward with these complaints, they are often ignored or made to wait in seemingly interminable administrative queues.

Section 332(c)(7)(B)(v) provides that parties may "petition" the Commission for relief if a state or local action violates Section 332(c)(7)(B)(iv). PCIA is fearful that, if the Commission adopts a case-by-case approach to these petitions, it is quite possible that long delays will ensue. In addition, such a case-by-case approach is unnecessarily wasteful of Commission and carrier resources, given that many of these petitions will allege similar violations of federal law. Carriers thus need a fast and effective method for informing states and localities in no uncertain terms that their actions are in violation of federal law.

To address these concerns, PCIA had concluded that the Commission could act pursuant to its declaratory ruling authority. PCIA hopes that these policies will now be further explored in the context of the forthcoming rulemaking.

First, the Commission should develop policy guidelines that clearly set forth under what circumstances state and local testing and documentation requirements related to the environmental effects of radio frequency emissions become so onerous as to effectively constitute state regulation of these emissions. To take an extreme example, if a state or locality required the daily testing of a transmission facility's electromagnetic emissions, and the documentation of such testing, these regulations would almost certainly violate Section 332(c)(7)(B)(iv). Similarly, a requirement that such testing be performed by a licensed electrical engineer is so far in excess of federal procedural guidelines that it seems to constitute state regulation of radio frequency emissions. Finally, testing would not be warranted for any facilities that are categorically exempt (and thus *not* subject to routine environmental evaluation) under Section 1.1307(b) of the Commission's Rules.

PCIA further suggests that unless a party challenging a tower siting application can *adduce affirmative evidence of non-compliance with Commission RF standards*, state and local zoning authorities should be prohibited from taking evidence on this issue. Such a rule is required because zoning hearings have become forums for the discussion of the adverse health effects of RF emissions, even though the licensee in question fully complies with all federal standards. The discussion of these adverse health effects is generally highly prejudicial to the zoning applicant, and is not always mentioned in the decision denying the application, thereby making it difficult to challenge such decisions under Section 332(c)(7)(B)(v). Thus, by requiring a *prima facie* showing of non-compliance with FCC guidelines as a precondition to the discussion of RF emissions at zoning board hearings, the Commission can prevent states and localities from doing indirectly what they are plainly prohibited from doing directly.

Second, PCIA recommends the adoption of an expedited timeline for resolving challenges to state and local actions that violate Section 332(c)(7)(B)(iv). The schedule established by the Commission should specify not only comment dates but also the period of time (from the filing of the petition) in which the Commission must complete action. It is important that wireless service providers be provided with a fast answer to the question whether a state or local action is preempted by federal law. If the action is preempted, then the carrier could continue to build out its facilities. Alternatively, if the action is found to be a legitimate exercise of local authority, then the carrier could make the business decision whether to pursue a judicial appeal or abandon the project. In either case, an expedited decision is of great importance to carriers, which must adjust their business plans according to the feasibility and expense of constructing new facilities.

PCIA had compiled legal analysis indicating that the action proposed by PCIA could be accomplished by means of a declaratory ruling in lieu of a rulemaking proceeding. If it would be helpful to provide the Bureau with that analysis, please let us know. Given that the Commission has decided to proceed by means of a rulemaking, we did not feel it was necessary to include that discussion in this letter.

In developing its proposals, PCIA sought to balance the legitimate interests of affected entities -- federal policies, local interests, CMRS providers, and members of the public. Local and state governments clearly have legitimate policies to protect, but it is essential that the Commission make clear the boundaries of the activities that may be regulated.

In addition, as the Commission is well aware, its newly adopted RF rules and guidelines were adopted following extensive comment and analysis by expert scientific and health organizations, expert agencies, and interested parties. In light of this fact, adoption of an expedited preemption process -- which still affords adequate time for the submission of comments by the challenged regulatory body -- will not in any way compromise public safety and health.

Congress and the Commission have repeatedly reiterated the benefits to the American public from competition in telecommunications services, ranging from competitive pricing to the availability of niche services tailored to meet the needs of particular individuals. To achieve those benefits, CMRS carriers must be able to build out their systems without undue and unwarranted impediments imposed by state and local governments. Accordingly, the importance of Commission action in this area -- completed quickly -- cannot be underscored enough.

Again, we appreciate your time and attention to this important set of issues for the wireless industry, and PCIA looks forward to submitting its comments in response to the forthcoming notice of proposed rulemaking.

Sincerely,

Jay Kitchen

Jay Kitchen
President

JK/rg
cc: Daniel Phythyon